IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5537

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SUPREME COURT, U.S.

GEORGE STREET,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy Attorney General

RICHARD L. CHAMBERS
Deputy Attorney General

JOHN C. WALDEN
Senior Assistant Attorney General

KIRBY G. ATKINSON
Assistant Attorney General

Please serve:

KIRBY G. ATKINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404)656-3397

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I.

STATEMENT OF THE CASE

George Street, Petitioner herein, was indicted on November 8, 1974, by the grand jury of Pierce County for the offenses of murder and armed robbery. (R. 1-5). Tried before a jury, Petitioner was found guilty of murder and armed robbery and sentenced to death for the offense of murder. (R. 5, 24-26). The jury found beyond a reasonable doubt that the offense of murder was committed while Petitioner was engaged in the commission of the offense of armed robbery, and that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. (R. 12). Following denial of Petitioner's motion for new trial as amended on June 25, 1975, a notice of appeal was filed on July 23, 1975. (R. 67). The conviction and sentence was affirmed by the Georgia Supreme Court. Street v. State, 237 Ga. 307 (1976).

On October 14, 1974, Petitioner George Street and Ruby Taylor, his common-law wife, resided in the home of Billy and Lucy Mae Ingram. (T. 196, 353, 372). Early that morning Ruby Taylor went into labor and was taken to Pierce County Hospital for delivery. (T. 3, 75-76).

The hospital policy required that before a patient could be transferred from the emergency room (treatment room) into the hospital, proper arrangements had to be made to cover the hospital expenses. (T. 7). Betty Pearson, a hospital employee, saw Petitioner at approximately 6:30 a.m. and again at 9:00 - 9:30 a.m. on October 14, 1974, and explained this policy and procedure to him. (T. 3, 4). Several other hospital employees also saw Petitioner at the hospital during the morning hours. (T. 11, 24, 56).

The murder victim, Mr. M. B. "Red" Herrin, drove a school bus and operated a taxi service. (T. 38). His wife worked at Pierce County Hospital. (T. 37). Mr. Herrin would leave home at approximately 7:00 a.m. to drive the school bus and return at approximately 8:30 a.m. to pick up his taxi. He would then operate the taxi service until approximately 2:00 p.m. when he would again drive the school bus to return the children home. (T. 39, 40).

Mr. Herrin carried a pistol and a blackjack in his taxi for protection. (T. 41). He also carried enough money to change small bills. (T. 42). In the taxi there was also a small plywood box used to deposit tax receipts from fares collected from passengers. (T. 42, 43). Also in the taxi were insurance papers, tag receipts, etc. (T. 44). On the day of his death, Mr. Herrin was also wearing his wedding band, masonic ring and wristwatch. (T. 43).

Mrs. Herrin had given her husband a check to cash, in the approximate amount of $50.00, from her former employer. At approximately 10:00 a.m. Mr. Herrin arrived at the hospital and gave his wife $20.00 from the proceeds of the check. (T. 37).

At approximately 11:00 a.m., October 14, 1974, Mr. Dean Broome, who operated a printing office and supply store across the street from Mr. Herrin's taxi office, saw Mr. Herrin parked and awaiting a fare. (T. 58, 59). As Mr. Broome left his store, he saw a black man, of Petitioner's size and facial features, probably wearing a hat, enter the taxi. (T. 59, 60). Mr. Broome saw the passenger a second time when the taxi driven by Mr. Herrin subsequently passed him. (T. 60).

Sammy Taylor, Ruby Taylor's brother, saw Petitioner arrive at his home on October 14, 1974, in a taxi. He also saw Petitioner leave in a taxi. (T. 95, 96).

Mrs. Elmo Strickland worked for Dr. Catherine Hendry. (T. 102). She first noticed Mr. Herrin's unattended cab parked adjacent to Dr. Hendry's office at approximately 12:30 p.m., just before she left for lunch. (T. 102, 103). The cab was still in the same location at 3:30 p.m. and was there at 4:55 p.m. when she left worked. (T. 104).

At approximately 2 -2:30 p.m., Petitioner was again seen at Pierce County Hospital. (T. 11, 26, 56). On that occasion Petitioner was noticed to have a bandage wrapped around two fingers of his left hand. (T. 14). Street also paid $29.00 on the hospital bill of Ruby Taylor. (T. 27).

When Mr. Herrin failed to show up to drive the afternoon school bus, Mr. Byron Dale Thomas contacted Mr. Roberts to drive the bus. (T. 106, 107). After Mr. Thomas and Mr. Roberts returned from their bus routes, Mr. Thomas decided to ride around town and look for Mr. Herrin's cab. (T. 108). He discovered the abandoned taxi at approximately 5:00 p.m., adjacent to Dr. Hendry's office. (T. 109). Mrs. Herrin pursuant to a telephone call from Mrs. Mamie Smith received at approximately 4:45 p.m., called her daughter-in-law and requested that her son be informed that his father's car had been found abandoned.

Mr. Thomas, Mr. Roberts and Milton Allen Herrin, the victim's son, returned to the abandoned taxi. (T. 110). They observed blood in the front seat, on the steering wheel and on the head rest. (T. 11, 112). They then drove to the police station and notified the authorities. (T. 112).

Subsequently, the investigation led to an abandoned house in the Walkerville Community. (T. 184). George Street had once lived in the abandoned house, now the murder scene. (T. 410). At the murder scene a trail of blood led from the front yard, through the house into the backyard to an abandoned well. (T. 188, 190). The well curving showed signs of blood, but the water was dark and stained preventing a visual determination of the depth of the well. (T. 344, 411). The well was full of water, to within 18-20 inches of ground level. (T. 187-411). The depth of the water was approximately 10-10 1/2 feet. (T. 345).

Police Chief Daniel Taylor probed the well with a pike pole to no avail. Thereafter, Chief Taylor, secured by a rope, was lowered into the water. He probed the water with the pike

pole until it hooked into the right shoe of the victim, who was in the well head first, and lifted the body of Mr. Herrin from the well. (T. 344).

Petitioner was confronted at the home of Billy Ingram where he was advised of his constitutional rights. (T. 195, 416). Pursuant to consent given by Billy Ingram, the following items were recovered primarily from the bedroom occupied by Petitioner and Ruby Taylor: a hawk bill knife, a black billfold, two brown paper bags containing a hat with the word Budweiser on it, one white pullover shirt, a blackjack and a man's shirt and trousers. (T. 201). In the living room officers found a Caravelle wristwatch. (T. 202). Petitioner admitted that he owned the hawk bill knife, State's Exhibit 6. (T. 213). Lucy Mae and Billy Ingram testified that on October 14, George Street was wearing the watch which they had never seen him wear before. (T. 353, 372). The watch and blackjack were identified as belonging to Mr. Herrin. (T. 397).

Petitioner was advised of his constitutional rights on October 15, 1974, and on October 17, 1974. (T. 211). Thereafter, on October 17, 1974, Petitioner made a statement in the presence of District Attorney Dewey Hayes, Sheriff Noah Strickland and investigator Charles Bryant. (T. 447). Sheriff Strickland testified concerning Petitioner's statement and thereafter a tape recording of the statement was played for the jury. (T. 447).

On the tape recording, Street acknowledged that his statement was being recorded and acknowledged that he had been advised of his constitutional rights. (T. 447, 448). His statement, in summary, was as follows:

After leaving the hospital, and before lunch, Street contacted Mr. Herrin to drive him to his mother-in-law's home. When they arrived at her home, Street stayed for a few minutes before returning to the taxi. Mr. Herrin then drove him back into town where Street attempted to telephone his mother, who did not answer the phone. Street then had Mr. Herrin return him to his mother-in-law's home, and thereafter drive him back into town where he again tried unsuccessfully to call his mother. At that point, Mr. Herrin informed Street that his fare was now $38.00. Street knew he had only $20.00 so instructed Mr. Herrin to drive him to his brother-in-law's where he would get the money. Street directed Mr. Herrin to the abandoned house under the pretense that his brother-in-law resided there. When they arrived at the house Petitioner went inside, returned and told Mr. Herrin that his brother-in-law had apparently moved. Mr. Herrin then informed Street that he must pay the fare or he would take him to the sheriff. Petitioner stated that he was not going to the sheriff's office, at which time Mr. Herrin got out of the taxi and they started tussling. Street drew his hawk bill knife and slashed Mr. Herrin. He then ran into the house followed by Mr. Herrin, who exited the house and went over near the well and as he turned, George Street pushed him head first into the well. Street then ran to the taxi and drove it back into Blackshear where he abandoned it. (T. 447-457).

The autopsy revealed that Mr. Herrin suffered 14 knife wounds. (T. 480). The cause of death was multiple deep knife wounds and drowning, the latter possibly being the terminal event. (T. 482).

PART II

REASONS FOR NOT GRANTING THE WRIT

A. THE RECORD REFLECTS THAT ONLY ONE JUROR WAS IMPROPERLY EXCUSED FOR CAUSE; THE APPARENTLY ERRONEOUS EXCLUSION OF ONE JUROR BECAUSE OF THE JUROR'S CONSCIENTIOUS OPPOSITION TO CAPITAL PUNISHMENT DOES NOT DEMAND THE CONCLUSION THAT THE JURY WAS BIASED IN FAVOR OF CAPITAL PUNISHMENT.

On direct appeal to the Georgia Supreme Court, Petitioner urged that the trial court erred in overruling his objection to the qualification of prospective jurors regarding capital punishment and erred in correcting the transcript relative to the voir dire examination of jurors.

The Georgia Supreme Court noted that attached to the record on appeal was the hearing on the motion for a new trial and motion to correct the transcript. On the hearing, testimony was heard regarding the voir dire examination of prospective jurors on the issue of conscientious scruples against capital punishment. Street v. State, 237 Ga. 307, 312 (1976). The court also noted that the jury list used in selecting the jury indicated those jurors excused by the court, the State or by the defense and had been attached to the trial court's order without objection. Street, supra, at 312. The Georgia Supreme Court thus concluded that one juror had probably been improperly excused.

The bottom line issue is whether the jury which tried the Petitioner, less a juror improperly excluded, was thus "organized to return a verdict of death"; was "a hanging jury"; or that the State had "stacked the deck against Petitioner". Witherspoon v. Illinois, 391 U.S. 510, 521-523 (1968). The improper exclusion of one juror does not automatically categorize the jury which tried the Petitioner nor deprive Petitioner of an impartial jury.

In Witherspoon, supra, 47 jurors who did not believe in the death penalty or who had conscientious or religious beliefs against it were excluded. Likewise, in Boulden v. Holman, 394 U.S. 478 (1968), 15 jurors had been summarily excused because of their conscientious or religious opposition to capital punishment. The basis of Witherspoon was that there had been a systematic exlcusion of all who opposed capital punishment, and by virtue of such a substantial element of society being eliminated, the jury failed to reflect a cross section of the community. Bell v. Patterson, 402 F.2d 394, 398-99 (10th Cir. 1968) cert. den. 403 U.S. 955 (1971); but see Marion v. Beto, 434 F.2d 29 (5th Cir. 1970) cert. den. 402 U.S. 906 (1971).

Thus, the record will not support the conclusion that the jury which tried the petitioner, less one juror improperly excused was biased in favor of capital punishment to the extent that Petitioner was denied due process of law.

B. THE RECORD BEFORE THE GEORGIA SUPREME COURT PROVIDED SUFFICIENT BASIS FOR THE COURT'S MANDATORY REVIEW OF PETITIONER'S SENTENCE OF DEATH AND DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

Petitioner contends that the mandatory review of his death sentence violated his constitutional right to appellate due process of law because the voir dire was unreported. Particularly, he asserts a denial of due process because the unreported voir dire hindered his attorney in providing effective assistance and for the reason that the Georgia Supreme Court could not adequately determine that the sentence of death had not been imposed under the influence of passion or prejudice inasmuch as Petitioner had raised the issue of prejudicial pretrial publicity.

The Georgia Supreme Court is required to determine: (1) "Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor"; (2) whether the evidence supports the aggravating circumstances; and (3) whether the sentence is excessive or disproportionate to the sentence imposed in similar cases. Ga. Code Ann. § 27-2537 (Supp. 1976). In this regard, not only does the court consider the trial transcript and record, but also a separate report filed by the trial judge. See Gregg v. Georgia, No. 74-6257 (United States Supreme Court, decided July 2, 1976). As previously stated, the Georgia Supreme Court had before it the Clerk's jury list showing those jurors

struck and the reason therefore. Also, the court had the record and trial transcript available for review. Thus, while the complete voir dire was unreported, there was sufficient basis for the court's determination.

In his brief, Petitioner asserts that on direct appeal he stated that several jurors indicated on voir dire that they were acquainted with the facts of the case. (Petitioner's brief, p. 10). The Georgia Supreme Court stated that the basis of the motion for change of venue was extensive adverse pretrial publicity and danger of violence to Petitioner. Street, supra at 308. "We note there was no violence toward the Appellant during the trial." Street, supra at 308. The court also noted that the motion was based upon news articles (seven articles). Street, supra at 309. Also, on the hearing of the motion for a change of venue, numerous witnesses testified that they believed Petitioner would receive a fair trial in the county. Id. Particularly, the court noted that the basis of the alleged error was the allegation that a juror expressed a fixed opinion as to Petitioner's guilt. However, "We note that the juror . . . was not considered until after 12 jurors and the first alternate had been selected. She was then excused by the defense. There is no indication of how this would have prejudiced the Appellant." Id.

Even assuming that some jurors were acquainted with the facts of the case, that alone is insufficient to demand a finding that an impartial jury could not be impaneled. "[P]retrial publicity - even pervasive, adverse publicity - does not inevitably lead to

an unfair trial." Nebraska Press Association v. Stuart, __ U.S. __, 49 L.Ed.2d 683, 96 S. Ct. 2791 (1976). "The decided cases 'cannot be made to stand for the proposition that juror exposure to information about a State defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process'." Nebraska Press Association, supra; citing Murphy v. Florida, 421 U.S. 794 (1975). Assuming that certain jurors were in fact acquainted with the facts of the case, there is no evidence nor allegations that the "trial atmosphere . . . had been utterly corrupted by press coverage". Murphy v. Florida, supra at 798. Likewise, there is no requirement that jurors "be totally ignorant of the facts and issues involved." Id. at 800. In view of the issues and evidence before the court, the mandatory review of Petitioner's sentence of death did not constitute a denial of due process of law.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy Attorney General

Richard L. Chambers

RICHARD L. CHAMBERS
Deputy Attorney General

John C. Walden

JOHN C. WALDEN
Senior Assistant Attorney General

Kirby G. Atkinson

KIRBY G. ATKINSON
Assistant Attorney General

Please serve:

KIRBY G. ATKINSON
132 State Judicial Bldg.
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Atlanta, Georgia 30334
(404)656-3397